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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

David Allen Harbour,

Defendant.

No. CR-19-00898-PHX-DLR

**SUPPLEMENTAL PROPOSED
MODIFIED JURY INSTRUCTION
RE: COUNTS 11 AND 12**

Pursuant to the Court's request of February 27, 2023, the United States submits the following modified Jury Instruction relating to Counts 11 and 12 (Mail Fraud).

Mail Fraud – Completion of Scheme

For a mailing to “carry out or attempt to carry out an essential part of the scheme,” it must have been mailed prior to the scheme's completion. In deciding when a scheme was completed, you are to consider the scope of the scheme as it was devised by the Defendant. If during course of the scheme the Defendant formulated a specific plan for evading detection, mailings sent as part of that specific plan meant to lull the victims into a false sense of security or facilitate the concealment of the scheme are an essential part of the scheme to defraud.

1 If you find that the United States has not proven beyond a reasonable doubt that the
 2 mailings described in Counts 11 and 12 were “an essential part of the scheme” devised by
 3 the Defendant, then you must return a not guilty on both counts.

4 AUTHORITY

5 *United States v. Gelazela*, 777 F. App’x 898 (9th Cir. 2019); *Schmuck v. United States*,
 6 489 U.S. 705, 710-11 (1989) (“The wire itself “need not be an essential element of the
 7 scheme. It is sufficient for the [wire] to be incident to an essential part of the scheme, or a
 8 step in the plot.”); *United States v. Tanke* 743 F.3d 1296, 1301 (9th Cir. 2014) (“Where the
 9 victim’s money has already been obtained, wirings designed to avoid detection or
 10 responsibility for a fraudulent scheme fall within the wire fraud statute when they are sent
 11 before the scheme is completed.”); *United States v. Lane*, 474 U.S. 438, 451-52
 12 (1986) (“[T]he scheme was not completed *until the final mailing* ... because that mailing
 13 was intended (as were the two earlier ones) to ‘lull’ the [victim] into a false sense of
 14 security.”); *United States v. Rutigliano*, 790 F.3d 389, 401 (2d Cir. 2015); *United States v.*
 15 *Howard*, 350 F.3d 125, 128 (D.C. Cir. 2003) (“In applying the statute of limitations to mail
 16 and wire fraud the circuits appear uniformly to focus on the actual mailing and use of the
 17 wires.”); *United States v. Jones*, 712 F.2d 1316, 1320-21 (9th Cir. 1983) (“The mailings
 18 here follow the classic pattern of a ‘lulling’ scheme In such a scheme, the mailing
 19 reassures the victim that all is well, discouraging him from investigating and uncovering
 20 the fraud”); *United States v. Ferguson*, 584 F. App’x 749, 750-51 (9th Cir. 2014) (“[T]he
 21 letters were lulling letters because they were intended to reassure victims that neither their
 22 principal nor their previously accrued interest earnings were in jeopardy.... [T]he letters fit
 23 neatly into the definition of ‘lulling letters.’”)

24 Respectfully submitted this 27th day of February, 2023.

25 GARY M. RESTAINO
 26 United States Attorney
 27 District of Arizona
 28 s/ Coleen Schoch
 KEVIN M. RAPP
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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2023, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants who have entered their appearance as counsel of record.

s/ Coleen Schoch
U.S. Attorney's Office